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In the Supreme Court of the United States

October Term, 1948

No. 803

UNITED STATES OF AMERICA, *Petitioner*

v.

25.406 ACRES OF LAND, MORE OR LESS, SITUATE IN ARLINGTON COUNTY, STATE OF VIRGINIA, AND A. M. NEVIUS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment entered in this case on February 21, 1949, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The District Court wrote a memorandum opinion (R. 100-105) which has not been reported. The opinion of the Court of Appeals (R. 166-173) is reported at 172 F. 2d 990.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1949 (R. 174). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, in a proceeding to determine the value of vacant, undeveloped land taken by the United States, the future anticipated profits of a prospective enterprise projected upon the land may be admitted, "not as evidence of value, but as a matter considered by the witnesses."

STATEMENT

On May 28, 1947, the United States instituted condemnation proceedings to acquire 25.406 acres of land in Arlington County, Virginia, as a site for a veterans' hospital. On June 6, 1947, a declaration of taking was filed and $850,827 was deposited as estimated compensation.

In a trial before a jury in February 1948, a verdict of $1,600,000 was returned. The question here relates to the method by which respondents were permitted to prove value. At the time of the taking the respondents, the Nevius Associates, owned the property involved. It is vacant, unimproved land, lying just across the Potomac River from Washington, opposite the Lincoln Memorial and near the terminus of the Memorial Bridge in Arlington County, Virginia (R. 19-21).

Experts for the Government in valuing the property considered the location and character of the property, its adaptability for 12-story apartment usage, and sales of other property in the vicinity. The opinions of the witnesses for the Government were based upon market value of property in the vicinity and ranged from 70¢ to 75¢ per square foot, or a total of from $775,000 to $825,000. (R. 1-3, 4-8, 12-20, 21-24, 26, 27-28.)

Respondents were permitted to introduce in evidence a plan for the development of the property by the creation of a high-class neighborhood with eight elevator apartments, an apartment hotel, stores, shops, garages, etc.* They took the view that testimony of the capitalization of the estimated yearly income from the operation of the anticipated project was admissible as one of the elements considered in forming an opinion of value. By this method a certain proportion of the yearly anticipated net income from the operation of the future project is attributed to the land as anticipated yearly income from the land. This so-called "yield of the land" is capitalized in perpetuity to obtain an estimated value of the land, designated "land residual value."

The first valuation witness for respondents testified in great detail as to the anticipated costs of the future project, the estimated rentals for 968 pro-

* The testimony indicated that the plans were drawn up, but that no final agreement had been entered into for the financing or construction of the project (R. 78-79).

posed apartment units, the estimated revenue from the operation of the prospective hotel of 286 suites, the estimated additional revenue to be derived from 750 automobile garage stalls and from store rentals and dining room profits in the operation of the hotel dining room (R. 48-55).

Respondents' witnesses Babcock, Davis and Winston all capitalized the anticipated net income from the prospective enterprise, and considered the so-called land residual value obtained by a capitalization of the estimated income attributed to the land. Based upon a consideration of this element, the character, size and location of the land, and sales of property in Washington, D. C., at Scott Circle, Dupont Circle and Massachusetts Avenue at 21st and 22nd Streets, respondents' witnesses valued the land at from $2.50 to $6.00 per square foot, or from approximately $2,500,000 to $6,000,000. (R. 39-56, 58-80, 82-89.)

The Government resisted admission of respondents' testimony of capitalization of anticipated income from the prospective project as an improper element for consideration in valuing vacant land by objections to the testimony, by motions to strike, and by requested charges. All of these objections were overruled. (R. 35, 36-37, 51, 55, 75-76, 81-82, 88, 92-93, 94-95). The Government's motion to set aside the verdict was denied May 12, 1948. (R. 100.) Judgment in the verdict was entered July 6, 1948 (R. 105-107). The Court of

Appeals affirmed in an opinion announced February 21, 1949.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that it was not improper for the trial court to admit in evidence the opinions of expert witnesses as to anticipated future profits from a prospective enterprise, in a federal eminent domain proceeding to determine compensation for the taking of vacant land.

2. In holding that the admission of estimated future profits in evidence was within the scope of discretion of the trial judge.

3. In affirming the District Court's entry of judgment in favor of respondents.

REASONS FOR GRANTING THE WRIT

Contrary to the established rule in eminent domain, the court below has permitted the admission in evidence of expert opinion as to the estimated profits to be derived from a prospective enterprise projected upon the land taken by the Government, and also as to the amount of such profits attributable to the land on account of estimated income from the land itself. Respondents' witnesses gave their opinions of the present money value of the future anticipated profits from an unrealized plan for the development of vacant land into a high-class apartment and apartment hotel project with

its own surrounding high-class neighborhood, and the jury was allowed to consider this detailed testimony.

1. a. In admitting the testimony for consideration in formulating an opinion of the value of vacant land, the lower court departed from sound principles of eminent domain valuation, as well as well-settled legal precedent. Anticipated earnings from a prospective use of land have generally been held irrelevant to the issue of the market value of vacant land, and not admissible in evidence because they are speculative, depend largely on other factors than the value of the land itself, and really represent an appraisement of the present money value of the anticipated profits and not the market value of the land itself as of the date of taking. Furthermore, even assuming the infallibility of profit prediction, it is obvious that a figure devised by a capitalization of the income ascribed to the land from the capitalized profits of the enterprise is not evidence of the current market value of vacant land but of a value of the land as enhanced by the prospective going enterprise. Such a figure is also objectionable for the additional reason that it includes business profits, and usually contains the elements of business loss and frustration which are not compensable items in federal eminent domain proceedings.

For these reasons, the federal courts and the bulk of the state courts have refused to permit

evidence of anticipated profits on *prospective* projects, and have laid down a flat rule of exclusion. *United States* v. *Boston, C. C. and N. Y. Canal Co.*, 271 Fed. 877 (C. A. 1); *United States* v. *Meyer*, 113 F. 2d 387, 397 (C. A. 7), certiorari denied, 311 U. S. 706; *United States* v. *3.544 Acres of Land in Philadelphia County*, 147 F. 2d 596 (C. A. 3); *United States* v. *Certain Parcels of Land in Rapides Parish*, 149 F. 2d 81, 82 (C. A. 5); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 253 (C. A. 4); *Spring Val. Waterworks* v. *City and County of San Francisco*, 192 Fed. 137, 163 (C. C. N. D. Cal.); *United States* v. *13.40 Acres of Land in City of Richmond*, 56 F. Supp. 535, 538 (N. D. Cal.); *San Diego Land etc. Co.* v. *Neale*, 88 Cal. 50; *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416; *The People* v. *Paisley*, 288 Ill. 310; *Burt* v. *Wigglesworth*, 117 Mass. 302; *Greenspan* v. *County of Norfolk*, 264 Mass. 9; *Ringwood Co.* v. *North Jersey D. W. S. Comm.*, 105 N. J. L. 165; *Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. (N. Y.) 272; *Hamilton* v. *Railroad Co.*, 190 Pa. 51; *Kossler* v. *Railway Co.*, 208 Pa. 50; *Richmond & P. Electric Ry. Co.* v. *Seaboard Air Line Ry. Co.*, 103 Va. 399; *Strouds Creek & M. R. Co.* v. *Herold*, 45 S. E. 2d 513. Cf. *Sharp* v. *United States*, 191 U. S. 341, 348; *United Gas Co.* v. *R. R. Comm'n*, 278 U. S. 300, 318; *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 396 (C. A. 2). The recognized commentators in

this field have taken the same position. 1 Bonbright, *Valuation of Property* (1937), pp. 429-431; Orgel, *Valuation under Eminent Domain* (1936), secs. 160-161, 173, 184; 2 Lewis, *Eminent Domain* (3d ed. 1909), secs. 654, 709, 727; 2 Nichols, *Eminent Domain* (2d ed. 1917), secs. 445, 453.

The fact that the court below concluded that the testimony in question "related not to the nebulous cost of constructing a vague hypothetical project and the estimated income to be derived therefrom, but to the cost and expected income of a project which, according to the evidence, was definitely in the process of achievement," (R. 168), does not take the project out of the category of "hypothetical" or "prospective," nor the testimony out of the realm of speculation as to future anticipated profits. The important factors, outlined above, which have led to the firm rule that all testimony as to future profits is inadmissible plainly apply even though the unrealized enterprise may be "definitely in the process of achievement." Cf. *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877, 884-6 (C. A. 1) (canal already in existence).

b. The Court of Appeals also relied on the fact that the testimony as to the estimated income "was admitted, not as evidence of value * * * , but as a matter considered by the witness in arriving at the estimate of value * * *"; that "Testimony as to

value would be worth little or nothing, if witnesses were not allowed to explain to the jury * * * the reasoning by which they have arrived at the expert opinion to which they testify * * *"; and that "the scope of such examination is a matter properly committed to the sound discretion of the trial judge * * *." (R. 169-170.)

But the court's approval of the admission of the testimony "not as evidence of value * * *, but as a matter considered by the witness in arriving at the estimate of value," does not change the effect as a precedent of the ruling that the estimated profits were admissible; rather, it opens the door to their invariable admission before the jury under such guise, in spite of the fact that this type of testimony is irrelevant and incompetent. The attempted distinction is insubstantial and misleading. If income can be used to test the opinion of an expert as to the value of the land, it can hardly be said that income is not being used as evidence of value. Matters testified to by an expert in arriving at his estimate of market value in an eminent domain proceeding must be proper elements of just compensation. A proper element of value is based upon competent evidence, and items which are not relevant in measuring compensation must be completely withheld from the consideration of the jury. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; *Kinter* v. *United States*, 156 F. 2d 5, 7 (C. A.

3). Were it otherwise, incompetent elements in measuring just compensation—such as consequential damages, business losses, or enhancement in value due to the project—could enter into the expert's opinion of value and the evidence be rendered competent and introduced before the jury by the mere device of admitting it, "not as evidence of value, but as matter considered by the witness."

Similarly, the admission of such testimony cannot be rested on the District Court's discretion, for a trial judge has no discretion to admit testimony as bearing on value "to be considered only as a factor", which is incompetent and inadmissible as direct evidence of market value. *Kinter* v. *United States,* 156 F. 2d 5, 7 (C. A. 3). In that case, the court reversed because of the admission of evidence of cost of repairs and improvements, even though the jury was instructed that such costs were to be considered "only as a factor along with all the other evidence." And in *Greenspan* v. *County of Norfolk,* 264 Mass. 9, 12, such a charge was held not to cure the error in admitting evidence of anticipated income from a proposed development, because "The petitioner could not introduce such evidence under the guise of reasons which the witness gave in support of his opinion." Furthermore, once the testimony is admitted, unless it is excluded from the consideration of the jury by the court's instruction, it is before the jury and no one can say how much it influences its verdict. *San Diego Land*

etc. Co. v. *Neale,* 88 Cal. 50, 61-62; *Central Georgia Power Co.* v. *Stone,* 139 Ga. 416, 421; Orgel, *Valuation Under Eminent Domain* (1936) secs. 131, 162. Nor could the fact that a trial court gave a proper charge on what constitutes market value negate the error. A correct general charge on the principles of eminent domain and market value could hardly effect the necessary cure. *Throckmorton* v. *Holt,* 180 U. S. 552, 567; *Knickerbocker Trust Co.* v. *Evans,* 188 Fed. 549, 567 (C. A. 1); *Hamilton* v. *Railroad Co.,* 190 Pa. 51, 61-62.

2. The decision below is in conflict with the holdings in *United States* v. *Meyer,* 113 F. 2d 387 (C. A. 7), certiorari denied, 311 U. S. 706, and in *United States* v. *Boston, C. C. & N. Y. Canal Co.,* 271 Fed. 877 (C. A. 1). In the *Meyer* case, the Court of Appeals for the Seventh Circuit squarely held, in an eminent domain proceeding, that the material question was the market value of the land, and that "past profits and probable future profits are too conjectural to furnish any basis for determination of value" (p. 397). And in the *Boston Canal Co.* case, it was held by the Court of Appeals for the First Circuit that the probable future tonnage of the already existing canal and the additional revenue to be derived, in view of such increased tonnage, were not proper subjects of opinion evidence (pp. 884-886). In the present case, on the other hand, the Court of Appeals concluded that it was not error for the trial court to admit testimony as

to the estimated profits from the prospective apartment-and-hotel development projected by respondents, the plans for which had not even come to fruition. Thus, there is again presented here, by way of a conflict, the question which this Court found it unnecessary to pass upon in *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 285:— whether the profits attributable to respondents' hypothetical enterprise should be excluded for the reason that they are too speculative.*

The decisions of the Fourth Circuit itself seem contradictory. In *Bank of Edenton* v. *United States,* 152 F. 2d 251, 253 (C. A. 4), the court refused to approve the admission, to show acreage value, of evidence as to divisibility of the land into lots and the prices at which such lots could be sold. Such evidence does not contain the element of anticipated profits from a business enterprise, as does the evidence admitted in the instant proceeding. Nevertheless, the court approved the admission in the present case.

3. Whether such speculative evidence is to be admitted in condemnation cases is a question of considerable importance to the United States, which at the present time is engaged in condemning 9,382,643.74 acres of land, involving deposits totaling $33,611,166.60, for flood control, irrigation, and other public purposes. The problem is particularly

* Cf. *United States* v. *Waterhouse,* 132 F. 2d 699 (C. A. 9), affirmed by an equally divided Court, 321 U. S. 743.

pertinent at this time because of the extensive condemnation of land for dam and power site projects. The Government is repeatedly confronted with attempts of private landowners to inject into the valuation proceedings grandiose plans for the development of unimproved property, the value to be determined by the capitalization of prospective profits. The instant ruling opens the door to unlimited speculation of that character, with resultant inflated verdicts as in the present proceeding.

CONCLUSION

The decision below is in conflict with those of other Courts of Appeals which we believe to be correct. The question is one of importance. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1949.

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IN THE

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25.406 ACRES OF LAND, MORE OR LESS, SITUATE IN ARLINGTON COUNTY, STATE OF VIRGINIA, and A. M. NEVIUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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The District Court wrote a memorandum opinion (R. 101-105) [1] which has not been reported. The opinion of the Court of Appeals (R. 167-173) is reported at 172 F. 2d 990.

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[1] References to the appendices printed in the court below and bound together here will be designated "R". References to the typwritten transcript of record filed with the Court will be designated "T".

We shall ordinarily content ourselves here with illustrative rather than comprehensive citations to the record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1949 (R. 174). The petition for writ of certiorari was filed on May 19, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Respondents showed that their land would have been used for a first-class, elevator apartment project, which was virtually ready to start construction when it was taken by the Government. The question is whether the District Court abused its discretion in allowing each of three of the expert witnesses to include the probable income to the land from this project as one element in his overall opinion as to value.

STATEMENT

The 25.406 acres of land here involved are commonly known as the "Nevius tract." It is directly across the Potomac River from the Lincoln Memorial. Parkland lies between the tract and the River, and Arlington Cemetery to the south; Lee Boulevard is on the north and sharply rising woodland on the west (R. 110, 116).

The tract was taken in June 1947 for a Veterans Administration hospital, and $850,827 deposited in the registry of the court as the estimated just compensation. The issue of just compensation was tried before a jury in February, 1948, and a verdict of $1,600,000 was returned (R. 105-106). The District Court, after briefs and argument, in May 1948 denied the Government's motion to set the verdict aside (R. 101-105), and the court below affirmed.

Every witness, for the Government and the appellees alike, agreed that the highest and best use of the Nevius tract was as a site for an elevator apartment house or apartment hotel project (e. g. R. 39, 112). It was the closest privately owned land to the Memorial Bridge and

is within a 5-10 minute trip of any point in downtown Washington (R. 20, 137, 153). The Potomac River lies before it and, across the River, there is an unobstructed view of the Mall. The immediate surroundings are unusually attractive (R. 67-68, 123-124). It has an abundance of light and air, permanently assured (R. 137, 143).

The tract is well-shaped, and large enough to permit maximum economy in construction and in operation, as well as free use of garden space (R. 67, 128). It is gently rolling, with underlying rock. No significant grading, drainage or piling would be necessary for construction. All utilities and sewers are already installed adjacent to the tract. (R. 20, 143, 154.)

The tract is zoned for 12 story apartment construction. Only one other tract, a markedly inferior site, in the Washington area has that advantage (R. 1, 144). It has unusual protection against a deterioration in its neighborhood, from the Government parklands which lie on two sides and from the ridge to the west (R. 125, 143-144).

There was no dispute by the Government of the respondents' testimony that this was not only the best apartment site in the County, but also in the entire area of Metropolitan Washington (R. 69, 127). Eken, who is probably the world's largest developer and builder of apartment projects, testified that, when he investigated the site for Equitable Life Assurance Company, "it was the finest site I had ever seen, and I still feel that today" (R. 143, 139-141, 144). The respondent's witnesses pointed out that there was an exceedingly large amount of investment capital anxious for just such an opportunity as that presented by the Nevius tract (R. 148, 158). This market, indeed, had twice produced an actual project for development of the site. The first project was ready to break ground when, on the day before Pearl Harbor, the Nevius tract was "lifted out of the Defense zone and priorities can-

celled'' (R. 162-163). The Government's petition is based upon the admission of evidence relating to the second project.

Brown, Wheelock, Harris & Stevens, one of the country's larger real estate and management firms (R. 130) in 1945 obtained a promise of financial cooperation from the President of the Equitable Life Assurance Company Society, and in 1946 developed plans for a first-class apartment house and apartment hotel on the site (R. 76). Architects' plans were prepared, Starrett Bros. & Eken engaged as builders, and the project planning completed (R. 77). The project would have involved an apartment hotel and eight elevator apartment buildings with a total of about 4,200 rooms (R. 49, 51). Equitable agreed to finance the project. All points of discussion between Equitable and the owners had been settled, except for one minor provision,[2] and construction could have started in 30 days, when the Government announced that it would take the property for a Veterans Hospital (R. 79-80, 146).

The appraisers for both parties encountered unusual difficulties in their preparation for trial because of the complete absence of the conventional evidence of sales of comparable properties (R. 21, 152). The witnesses for the Government sought the solution to their problem in taking Arlington sales and increasing those prices, through some unexplained process, to take account of the greater attractions of the Nevius tract. They placed chief reliance on a sale at 13.6 cents a foot and, altogether, they mentioned 12 sales of land, from 1941 to 1947 and at prices

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[2] Equitable proposed either of two types of financing: a $15,000,000 loan against the $17,000,000 cost; or construction by Equitable, after purchase of the site for a nominal figure, with lease of the completed project to the owners for 30 years at 6 per cent of cost and then for 20 years at 4 per cent. The owners chose the second alternative but proposed that the rental be reduced from 4 to 3 per cent in the last 20 year period (R. 78-79, 145-146).

from 8.6 to 47 cents a foot, as the basis of their 70, 72 and 75 cent valuation of the Nevius tract.[3]

Three of the witnesses for respondents — Babcock, Davis and Winston — included an estimate of the income attributable to the site as one element which they considered in reaching their overall opinion. Each explained very carefully that this was but one of many factors which he considered in reaching his opinion.[4] Each had made a very careful study of costs and returns (R. 51-54, 77-80, 87-89). Each is unusually expert in the field (R. 121-123, 130-133; T. 556-558). None testified to the capitalized land value indicated by his income estimates and none followed closely any capitalized value in reaching his over-all opinion.[5] The district court, in ruling this testimony admissible and in his charge to the jury, was careful to explain that the estimates of land income were not evidence but were simply to be accepted as specification of one of the reasons which led the expert witness to his final opinion as to value (R. 37, 88, 98; T. 311).

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[3] R. 5-6, 12, 15-18, 23, 25-27; T. 148-153, 186-188, 196, 205, 217-220, 225-6.

[4] Babcock enumerated some 11 factors (R. 41-48, 340-342) other than the probable yield of the land when developed according to plan (R. 48-55), which led to his opinion. Davis explained the three categories of factors — the features of the site, comparative prices, and the yield of the actual project proposed — which entered into his overall opinion (R. 66-67), and gave only brief attention to the question of yield (R. 79-80). Winston's testimony as to probable yield was expressly stated to be only one element in his opinion (R. 89), as it quite evidently was (R. 82-86, 152-158).

[5] Babcock would capitalize his $198,000 land income at 5% (R. 57), which would indicate a capitalized value of $3,960,000 as compared with his $3,500,000 to $4,000,000 appraisal (R. 41); Winston would capitalize his $240,000 at 5½%, indicating a land residual of $4,400,000 (R. 91) as compared to his $4,000,000 appraisal (R. 44A). Davis's appraisal of $5,500,000 to $6,600,000 (R. 66) compares with the $4,000,000 to $6,000,000 indicated by a capitalization of his $200,000 to $300,000 land income (R. 79-80).

The five Government witnesses testified to a value ranging from 70 and 75 cents a foot, or from $775,000 to $825,000 for the tract.[6] The seven witnesses for the respondent who testified to value gave figures ranging from $2.50 to $6.00 a foot, or from $2,800,000 to $6,600,000 for the tract.[7] The jury verdict was for $1.45 a foot or $1,600,000 for the tract. The court below commented that the jury "has probably done about what is right" (R. 173).

ARGUMENT

The Solicitor General urges, as reasons to grant the writ, that: (a) anticipated earnings from a prospective use of land are inadmissible; (b) expert witnesses may mention in support of their opinions only matters properly admissible in evidence; and (c) the decision below is in conflict with two decisions in other circuits. He makes only one oblique reference (Pet. 10) to the controlling feature of the decision below — the informed discretion exercised by the trial judge.

I

Every piece of real property is, in a strict sense, dissimilar from every other. Some, as the Nevius tract here in issue, are wholly unique. There cannot be any universal formula which will point unerringly either to "fair market value" or to "just compensation" in each of the myriad of particular cases which go to make up the law of eminent domain. Appraisal procedures which serve well for a suburban lot will not make equal sense for farmland, for industrial sites, and for wholly unique apartment housing sites.

The federal courts have often recognized that each condemnation case must turn largely upon its own facts. Spe-

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[6] R. 8, 20, 24, 27; T. 227.

[7] R. 41, 44, 66, 136, 137, 151, 152, 159.

cificially, income testimony should be admitted or excluded according as it is likely to aid or to distract the search for "fair market value," and the result should turn on the availability and reliability of other evidence as to value, on the probability of the assumed project having been under way had the Government not intervened, and on the reliability of the income estimates. See *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 396 (C. C. A. 2); *Orgel*, Valuation Under Eminent Domain (1936), secs. 169-173. No general formula can solve this equation; it can be answered only in terms of a sound judgment rooted in the facts of the particular case.

This, to a greater or lesser degree, is the case with most of the evidence issues which arise in eminent domain proceedings. The federal courts in recent years accordingly have developed a general rule that the admissibility of evidence in a condemnation case rests in the discretion of the trial judge, and his action will not be reversed on appeal except for abuse of that discretion.[8]

The issue here is simply whether Judge Hutcheson abused his discretion in allowing expert witnesses to include, as one element leading to their over-all opinion of value, a careful estimate of the income which the virtually certain project would have produced for the owners of the Nevius tract. That is an issue confined to the four corners of this case and bears only a verbal relationship,

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[8] *Union Electric L. & P. Co. v. Snyder Estate Co.*, 65 F. 2d 297, 304 (C. C. A. 8); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892, 895 (C. C. A. 8); *United States* v. *Becktold Co.*, 129 F. 2d 473, 479 (C. C. A. 8); *United States* v. *Wise*, 131 F. 2d 851, 852 (C. C. A. 4); *United States* v. *Savannah Shipyards*, 139 F. 2d 953, 956 (C. C. A. 5); *United States* v. *Prettyman*, 142 F. 2d 891, 893 (C. C. A. 4); *Foster* v. *United States*, 145 F. 2d 873, 875 (C. C. A. 8); *Clark* v. *United States*, 155 F. 2d 157, 161 (C. C. A. 8); *Bowie Lumber Co.* v. *United States*, 155 F. 2d 225, 229 (C. C. A. 5); *United States* v. *Block*, 160 F. 2d 604, 607 (C. C. A. 9).

for example, to the canal and farmland condemnations relied upon by the Government (*infra*, pp. 13-14)

The court below, in short, did not make the abstract ruling presented for review by the Solicitor General. It was deciding a particular case and not composing a treatise. It explicitly confined its ruling to the exercise by the trial judge of his discretion on the facts of this case. It said, to take one of many examples in its opinion (R. 171):

> "We do not mean to say, of course, that an expert witness should be allowed to roam at large in the realms of fancy and testify at length about hypothetical developments and mythical income to be realized therefrom. When this is attempted it should be firmly suppressed because of its tendency to mislead and confuse and the waste of time involved. Nothing of this sort, however, is involved here. The development as to which testimony was allowed was one which had been carefully planned in detail before the taking by the government and one which would have been carried out but for the taking. Surely there was no abuse of discretion in permitting the experts to go into this as one of the matters they had considered in fixing values.

We show below that, even if this case were one of general application, it was correctly decided. That discussion, however, indulges the artificial assumption of the petition that the ruling below is applicable in other cases to other projects under other plans for other lands. Since the court below plainly made no such ruling, our discussion will be presented as summarily as possible.

II

1. The analysis of the problem is simplified, and the Government's array of cases reduced in volume, when it is remembered that the admissibility of income evidence in

a Federal condemnation proceeding is rather plainly a question of Federal and not of state law.[9]

2. A good many of the authorities cited in the petition contain language supporting the Solicitor General's broad statements. If these generalizations were in truth the law, there would be a most unhappy conflict between the courtroom rules of evidence and both the practice of the market place and sound appraising theory. The evidence in this case shows without contradiction that the large investors who form the market for a site such as this would fix their price by consideration of only one factor: probable income (R. 139, 147-149). Without any exception known to us, every authoritative writer on the theory and practice of appraising real property states that, in the case of investment property such as this, the appraisal must rest chiefly upon the probable income which the tract could produce.[10] The United States Government itself, when it is appraising property rather than conducting a law suit, follows the same approach. *Federal Housing Administration*, Underwriting Manual, 1938, pars. 1306, 1312, 1323.

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[9] See *United States* v. *Miller*, 317 U. S. 369, 380; *United States* v. *Certain Parcels of Land*, 144 F. 2d 626, 628-629 (C. C. A. 3); *United States* v. *Certain Tracts of Land*, 57 F. Supp. 739, 740-742 (S. D. Cal.); *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 694 C. C. A. 2), cert. den., 323 U. S. 726; *United States* v. *25.88 Acres of Land*, 62 F. Supp. 726, 729 (E. D. N. Y.); *State of California* v. *United States*, 169 F. 2d 914, 918 (C. C. A. 9); *United States* v. *13,255.53 Acres of Land*, 158 F. 2d 874 (C. C. A. 3); *Kinter* v. *United States*, 156 F. 2d 5, 6 (C. C. A. 3); *State of Nebraska* v. *United States*, 164 F. 2d 866 (C. C. A. 8); *Comparet* v. *United States*, 164 F. 2d 452 (C. C. A. 10); *United States* v. *Certain Parcels of Land*, 54 F. Supp. 561, 562 (S. D. Cal.)

[10] Illustrative citations are *Babcock*, The Valuation of Real Estate (1932, 9th Printing) p. 165; see also pp. 139, 287-294; *McMichael*, Appraising Manual (1944, 3d Ed.) p. 89; see also, pp. 84, 89-99, 100-103; *American Institute of Banking*, Home Mortgage Lending (1938), p. 149; *Hoagland*, Real Estate Principles (1940), p. 180; *Kniskern*, Real Estate Appraisal and Valuation (1933), pp. 241, 247, 324.

The courts have not, in fact, been as blind to the realities of valuation as the Solocitor General's highly selective list of authorities would indicate. They have, instead, allowed the use of income testimony in either of two circumstances: when used as one element leading to the expert's over-all value opinion, or as direct evidence of value with respect to a project which with reasonable probability would have been undertaken had the property not been condemned. The testimony of which the Government complains was admissible here under either of the last two rules. The district court amalgamated the two into a stricter requirement, and permitted the expert witnesses to include the anticipated income as one reason leading to their value because the project was reasonably probable (R. 37, 98, 102-103; T. 311).

3. It is settled beyond any question that the expert witness may testify to the grounds of his opinion. *Wigmore,* Evidence (3d Ed., 1940), vol. II, sec. 562; vol. III, sec. 992; vol. VI, sec. 1720. As Chief Justice Marshall put it, "A witness ought never to swear to inferences without stating the train of reasoning by which his mind has been conducted to them." *The Nereide,* 9 Cranch 388, 417. As a necessary corollary of this rule, the expert witness may explain the grounds of his opinion even though they include matters which could not be admitted into evidence as direct testimony. *Wigmore, supra,* vol. II, sec. 655, citing many cases, and sec. 665b. "As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness." *Trans. Line* v. *Hope,* 95 U. S. 297, 298.

These general principles find full application in the cases dealing with testimony as to anticipated income from the condemned property. At least in the federal courts, even in circumstances where income testimony is inadmissible as direct proof of value, the anticipated income may nevertheless be used as one basis for the overall value judgment

of the expert witness.[11] Indeed, the Government itself was of this view five years ago,[12] and the Solicitor General points to no recent change in the law.

4. We have shown in the Statement (*supra*, p. 4) that the project was virtually certain of consummation had the Government not taken the land. While it is not always easy to pass certain judgment from the opinions on the actual degree of probability of the potential uses of the land, we believe that the decisions show remarkably consistent results if they be classified according as to whether the potential project was a reasonably probable or merely a remote and speculative use of the land.

The condemnation court, we agree, should not be distracted by evidence of expected income from a project where there was not a reasonable probability, at the time of condemnation, that it would soon have been under way. In such cases, the courts have excluded the evidence.[13]

The result, however, is different when the income testimony relates to a use of the land which was reasonably probable at the time of the taking. The courts in such

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[11] *United States* v. *3.544 Acres*, 147 F. 2d 596, 598-599 (C. C. A. 3); *Fain* v. *United States*, 145 F. 2d 956, 958 (C. C. A. 8); *Edward P. Allis Co.* v. *Columbia Mill Co.*, 65 Fed. 52, 57-58 (C. C. A. 8); *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5); *United States* v. *Certain Parcels of Land*, 145 F. 2d 374 (C. C. A. 3), aff'g 53 F. Supp. 472 (E. D. Pa.); *City of Philadelphia* v. *United States*, 53 F. Supp. 492 (E. D. Pa.); *United States* v. *Certain Lands in Town of Highlands*, 45 F. Supp. 126, 127-128 (S. D. N. Y.); see, also, *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. C. A. 2).

[12] See its Petition (pp. 9-10) and Brief (pp. 28-29) in *United States* v. *Waterhouse*, 321 U. S. 743, No. 209, Oct. Term, 1943.

[13] *Bank of Edenton* v. *United States*, 152 F. 2d 251, 253 (C. C. A. 4); *Polson Logging Co.* v. *United States*, 160 F. 2d 712, 717 (C. C. A. 9); *Gage* v. *Judson*, 111 Fed. 350, 356-359 (D. Conn.); *United States* v. *Certain Lands in Town of Highlands*, 45 F. Supp. 126, 127-128 (S. D. N. Y.); *United States* v. *Indian Creek Marble Co.*, 40 F. Supp. 811, 821 (E. D. Tenn.).

cases have allowed the owners of the condemned land to prove the probable income which they would have derived under rather well-developed plans for the subdivision of acreage and the sale or lease of lots,[14] for the operation of a farm,[15] for the construction and operation of an irrigation project,[16] for logging operations,[17] for the construction of hydro-projects,[18] and for the development of unproved oil and gas deposits.[19] Many of the courts, it is true, have indicated that on the facts of their cases this was very weak evidence. But the fact remains, where the project itself was reasonably probable, almost every case seems to have allowed, in one form or another, the proof of anticipated income.[20]

As we read the cases, then, the admissibility of direct evidence as to income from future projects depends upon

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[14] *United States* v. *Certain Parcels of Land*, 144 F. 2nd 626 (C. C. A. 3); *United States* v. *Waterhouse*, 132 F. 2d 699, aff'd by equally divided court, 321 U. S. 743.

[15] *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95, 100-102 (C. C. A. 6), cert. den. 309 U. S. 688.

[16] *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, 418-423 (C. C. A. 9).

[17] *Morton Butler Timber Co.* v. *United States*, 91 F. 2d 884, 890 (C. C. A. 6).

[18] *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, 304 (C. C. A. 8); *United States* v. *Powelson*, 118 F. 2d 79 (C. C. A. 4), rev'd on other grounds, 319 U. S. 266.

[19] *Cal-Bay Corp.* v. *United States*, 169 F. 2d 15, 18-19 (C. C. A. 9), cert. den., No. 314, Oct. Term, 1948.

[20] Two cases, excluding income estimates of existing projects are a *fortiorari* exceptions to this generalization. *United States* v. *13.40 Acres of Land in City of Richmond*, 56 F. Supp. 535, 538-540 (N. D. Cal.) (quarry); *United States* v. *Davis*, 41 F. Supp. 595, 596 (E. D. Tenn.) (farm land). So, too, *United States* v. *5 Acres of Land*, 50 F. Supp. 69 (E. D. N. Y.) seems to be to the contrary. We discuss below (pp. 13-14) *United States* v. *Meyer*, 113 F. 2d 387, 397 (C. C. A. 7), cert. den., 311 U. S. 706, and *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1).

the probability of the project being put into operation had the land not been condemned. Our analysis thus turns back again to the inescapable fact that the valuation of real property must be done in terms of the particular property, and that the admissibility of evidence in a condemnation proceeding is more sensibly left to the discretion of the trial judge than to the black type of a text-book heading.

III

The Solicitor General seizes upon two of the several condemnation cases which on their own facts have excluded direct evidence of future income (see notes 13 and 20) and asserts their conflict with the decision below. Their dissimilarity from the present case emphasizes the procrustean character of his effort to fit decisions on individual facts into hornbook generalizations.

United States v. *Meyer*, 113 F. 2d 387, 397 (C. C. A. 7), cert. den. 311 U. S. 706, contains the broad statement quoted by the Solicitor General (Pet. 11). The opinion, directed almost entirely to other issues, contains no hint of the facts involved. The record shows, however, that the offered evidence consisted simply of a statement of the number of bushels of grain produced or expected to be produced per acre multiplied by the market value of the grain. No. 514, Oct. Term, 1940, R. 1062. The case bears no relation to that now before the Court.

United States v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1) involved an even more remote valuation analogy and related to the Cape Cod Canal. There a witness for the owners testified as to the probable tonnage of the canal 5, 10, 20 and 30 years in the future and as to the probable rates which would be in effect at those dates. He appears to have testified only as to gross revenues. The Circuit Court of Appeals did not reverse, as the Solicitor General would have it, because it was wrong

to testify as to future income but because (271 Fed. at 886): (a) the jury could form its own judgment as to future tonnage without the aid of an expert, and (b) the rates were subject to government regulation and to assume an increase in tolls was a mere guess. The decision, at least as to its first ground, is startling but has no bearing on the question presented in the petition.

CONCLUSION

The decision of the court below is correct, and is confined to the facts of this case. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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